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BETWEEN:

THE MINISTER OF NATIONAL
REVENUE

APPELLANT;

AND

HAROLD McKAY BOLSBYRESPONDENT.

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 2(1), 2 (s), 9, 34—Income Tax Act, S.C. 1948, c. 52, s. 15(3)—Section 34 a departure from section 9—Meanings of “year” and “fiscal period”.

The appellant was the proprietor of a business the fiscal period of which ended on March 31 in each year. On April 30, 1946, he sold his business and retired. In his income tax return for 1946 he reported the income from his business only for the fiscal period ending March 31, 1946, but the Minister re-assessed him for 1946 and added the income from his business for April, 1946, to the amount reported by him. He appealed to the Income Tax Appeal Board which allowed his appeal and the Minister appealed from its decision.

Held: That section 34 is a departure from the general charging section of the Act and a taxpayer cannot be affected by it unless he comes within its express terms.

- 2. That in 1947 the taxpayer was not the proprietor of a business at all and section 34 had no application to him and that the income from his business for April, 1946, had no place in his income tax return for 1947 but must be included in his taxable income for 1946.

APPEAL from a decision of the Income Tax Appeal Board.

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The appeal was heard before the Honourable Mr. Justice Thorson, President of the Court, at Toronto.

G. B. Bagwell, K.C. and *J. S. Forsyth* for appellant.

P. J. Bolsby K.C. and *P. B. C. Pepper* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

On the conclusion of the argument the President (November 30, 1951) delivered the following judgment.

This is an appeal from the decision of the Income Tax Appeal Board (1) allowing the respondent's appeal from his income tax assessment for the year 1946.

The facts are not in dispute. It was agreed between the parties that they are correctly set out in the reasons for judgment of the Assistant Chairman of the Income Tax Appeal Board. Prior to April 30, 1946, the respondent was the sole proprietor of a business in the City of Toronto known as the Bolsby Coal Company. He had carried on this business for more than 20 years and throughout the whole of this time the fiscal period of his business ended on the 31st day of March in each year. On April 30, 1946, due to ill health, he sold his business and retired. In his income tax return for the year 1946 he reported his income from his business for the fiscal period ending March 31, 1946. His net taxable income for that year, including such income, amounted to \$5,050.85, on which a tax of \$944.02 was levied and paid. The income from his business for the month of April, 1946, amounting to \$2,664.43, was reported in his income tax return for 1947. The amount of taxable income reported by him in this return, including this sum, came to \$3,527.26. The Minister re-assessed the respondent for the year 1946, adding the sum of \$2,664.43, being the income from his business for the month of April, 1946, to the amount of \$5,050.85 which he had reported in his return for 1946. From this assessment the respondent appealed to the Income Tax Appeal Board, contending that the income from his business for April, 1946, was properly

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included in his income tax return for the year 1947 and should not have been included in his assessment for the year 1946. The Board allowed the appeal, vacated the assessment and referred it back to the Minister to deduct the sum of \$2,664.43 from the respondent's taxable income for 1946, and to re-assess accordingly. From this decision the Minister appealed to this Court.

I am unable to see how the decision of the Board can stand. The appeal turns on the construction of section 34 of the Income War Tax Act, R.S.C. 1927, chap. 97, which reads as follows:

34. A member of a partnership or the proprietor of a business whose fiscal period or periods is other than the calendar year shall make a return of his income and have the tax payable computed upon the income from the business for the fiscal period or periods ending within the calendar year for which the return is being made, but his return of income derived from sources other than his business shall be made for the calendar year.

This section is a departure from the general charging section of the Act, section 9, which provides that in the case of a person other than a corporation or joint stock company the tax shall be assessed, levied and paid upon the income "during the preceeding year" of such person. According to section 2(1), "year" means the calendar year. Thus, if it were not for section 34 the respondent, like every other individual person, would have been assessable only upon his income for the calendar year. It follows, since the section is a departure from the general rule, that a taxpayer cannot be affected by it unless he comes within its express term.

As I read the section, I am unable to see how the respondent's income from his business for April, 1946, could possibly be properly included in his income tax return for 1947. It was not income from the business for a fiscal period ending within the calendar year for which the return was being made, for the respondent had no fiscal period ending in 1947. Moreover, he had no business after he sold it on April 30, 1946. He then retired from business. Consequently, in 1947 he was not the proprietor of a business at all. He had ceased to be such on April 30, 1946. The conclusion seems plain that in 1947 he did not come within the terms of section 34 at all and that it had no application to him. He, therefore, fell back under

the general charging section of the Act. The income from his business for April, 1946, thus had no place in his return for 1947 and could not have been validly included in his assessment for 1947. That being so, the Minister was right in determining that the amount of the respondent's April, 1946, business income had no place in his return or assessment for 1947 and must be added to the amount reported by him in his return for 1946 as an item of taxable income for 1946.

Since the respondent's April, 1946, business income cannot be included in his income tax assessment for 1947, it must be included in his taxable income for 1946. It cannot fall anywhere else. It was income earned in 1946 and must be considered as subject to the general charging of section 9, to the extent that it was not covered by section 34. The term "fiscal period" is defined by section 2(s) as follows:

2. In this Act, and in any regulations made hereunder, unless the context otherwise requires,

- (s) "fiscal period" means the period for which the accounts of the business of the taxpayer have been, or are ordinarily made up and accepted for purposes of assessment under this Act, and in the absence of such an established practice the fiscal period shall be that which the taxpayer adopts:

Provided, however,

- (i) that such fiscal period shall not in any case exceed a period of twelve months; and
- (ii) that if a taxpayer purports to change his or its usual and accepted fiscal period, the Minister may, in his discretion, disallow such change.

In view of this definition I do not see how it could be held, as counsel for the appellant contended, that the respondent had two fiscal periods ending in 1946, one at March 31, 1946, and the other at April 30, 1946. He had only one fiscal period for which the accounts of his business had been or were "ordinarily made up and accepted for purposes of assessment under the Act" and that was the period ending on March 31, 1946. Consequently, it was only the income from the business for that fiscal period that could be included in his taxable income for 1946 under the authority of section 34. That was, therefore, the whole of the extent to which the section applied to him. Any other income, whether from his business, to

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the extent to which section 34 did not apply to it, or from other sources, received during the taxation year 1946 was liable to assessment for that year.

In my opinion, the language of section 34 clearly supports the conclusion I have reached and I find no ambiguity in it. The Court must, therefore, give effect to it without regard to the effect it may have on the respondent. It may well be that there was a deficiency in the section and a failure to provide fairly for the case of a proprietor of a business who ceased to be such before the end of an ordinary fiscal period. That there was such a deficiency seems to be recognized by section 15(3) of the Income Tax Act, Statutes of Canada, 1948, chap. 52, which does make provision for such a contingency. But section 15(3) of the Income Tax Act is not the law governing this case and the Court must apply the law as it is with whatever deficiency there may be in it.

For the reasons given, I find that the assessment for 1946 against which the appellant appealed was valid. The appeal from the decision of the Board must, therefore, be allowed, and the assessment restored. The appellant is also entitled to costs.

Judgment accordingly.